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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEAD INDUSTRIES ASSOCIATION, INC.,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN MINING CONGRESS

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DESCRIPTION AND INTERESTS OF THE AMICUS CURIAE

The American Mining Congress (AMC) is an industry association that encompasses the producers of most of America's metal, coal, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and engineering and consulting firms and financial institutions that serve the mining industry. Included within this membership are lead producers represented by Petitioner, the Lead Industries Association Inc. (LIA). Also included within the AMC membership are producers of other metals from ores which

contain lead. All of these producers may be forced to close operations or to install air pollution control equipment to avoid violating the National Ambient Air Quality Criteria for lead.

AMC member companies are also subject to other emission limitations established to satisfy other National Ambient Air Quality Standards such as those for sulfur oxides and total suspended particulates. The criteria documents for those pollutants are currently being revised by the Environmental Protection Agency and consideration will be given to establishing new national ambient air quality standards based on the revised documents. Unless the Court exercises its discretionary jurisdiction to review the national ambient air quality standard for lead EPA may proceed to set other standards such as those for sulfur oxides and total suspended particulates on the basis approved by the Court of Appeals. Thus this case is of importance not only to AMC members impacted by the lead standard. It is important to all industry subject to requirements to meet other ambient air standards.

ARGUMENT

The Court should exercise its discretionary jurisdiction to review the decision of the Court of Appeals in this case. The opinion of the Court of Appeals approves the adoption by the Environmental Protection Agency of health standards which are not based on health effects, but which are allegedly necessary to protect against biologic response disruptions in function which may be demonstrated by "special testing but not by the classic techniques of examination" (Petitioner's App. 11a). This goes beyond the intent of the Clean Air Act.

I. Congress Expressly Recognized In The 1977 Amendments To The Clean Air Act That It Was Not Anticipated That The Standards Would Protect Against All Effects

In affirming EPA's interpretation of the statutory requirement to establish national primary ambient air quality standards which "allowing an adequate margin of safety are requisite to protect the public health," the Court of Appeals improperly relied on legislative history and ignored the express statutory recognition the Congress did not expect the National Ambient Air Quality Standards to protect the public health from all actual or potential effects which in the Administrator's judgment may reasonably be anticipated to occur from air pollution.

Section 109(b)(1) of the Clean Air Act as amended, 42 U.S.C. §7409(b)(1) provides for the promulgation of air quality standards as follows:

> (b)(1) National primary ambient air quality standards, prescribed, under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

LIA contended before the Court of Appeals that the proper interpretation of that provision directed the Administrator to adopt air quality standards which are "designed to protect the public from adverse health effects that are clearly harmful." (Petitioner's App. 38a) The Administrator contended that the provision "required that standards be set at a level at which there is 'an absence of adverse effect' on these sensitive individuals." (Petitioner's App. 43a)

The Court of Appeals rejected LIA's position and accepted the Administrator's interpretation citing in support of this action that "[t]he Senate Report explains that the Administrator is to set standards which ensure that there 'is an absence of adverse effects.' " This action ignores that with the adoption of 1977 amendments to the Clean Air Act Con-

gress repudiated the language of the Senate Report with the express recognition that the national ambient air quality standards are not to provide protection from all actual or potential effects.

This recognition is contained in Section 160 of the Clean Air Act as amended, 42 U.S.C. Section 7470. That section was added by the the 1977 amendments and sets forth the purposes for the new Part C, Prevention of Significant Deterioration of the Air Quality. The portion relevant to this discussion is as follows:

> Sec. 160. The purposes of this part are as follows:
> (1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipated to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air), notwithstanding attainment and maintenance of all national ambient air quality standards;....

Thus, Congress expressly recognized that the ambient air quality standards were not to be set at a level to ensure that there is "an absence of adverse effects" as asserted by the 1970 Senate Report. Congress indicated that the Administrator could reasonably anticipate that actual or potential adverse effects would occur notwithstanding the attainment and maintenance of all national ambient air quality standards. If the Administrator was required to set standards which ensure an absence of adverse effects such a situation could not exist.

The Clean Air Act therefore does not require that national primary ambient air quality standards be established to ensure an absence of effects. Congress expressly stated that effects might be reasonably anticipated despite attainment of the standards. Since Congress did not intend to mandate standards to protect against all effects, it is only reasonable

to conclude that Congress intended that the national primary ambient air quality standards be designed to protect the public from adverse health effects that are clearly harmful. This was the position asserted by LIA.

The Court of Appeals erred in holding that "LIA's interpretation of the statute is at odds with Congress' directives to the Administrator." (Petitioner's App. 43a) The supposed directives in the legislative history such as the Senate Report do not surmount the express statutory recognition by Congress that effects may reasonably be anticipated notwithstanding attainment and maintenance of the national standards. Thus national primary ambient air quality standards are not to be set at the no effect level.

II. The Administrator's Interpretation of Section 109 Is Not Supported By The Legislative History

This Court has not ruled upon the proper interpretation of Section 109. If it does not exercise its discretionary authority to do so now the opinion below will be controlling on both future and past standard setting by the Administrator.

As set forth above Section 109 provides that national primary ambient air quality standards shall be standards the attainment and maintenance of which "are requisite to protect public health." They are to be based on the criteria document and allow "an adequate margin of safety."

The Administrator contended, as set forth in the opinion below (Petitioner's App. 43a) that Congress directed as follows:

> First, Congress made it abundantly clear that considerations of economic or technological feasibility are to be subordinated to the goal of protecting the public health by prohibiting any consideration of such factors. Second, it specified that the air quality standards must also protect individuals who are particularly sensitive to the effects of pollution. Third, it required that the standards be set at a

> level at which there is "an absence of adverse effect" on these sensitive individuals. Finally, it specifically directed the Administrator to allow an adequate margin of safety in setting primary air quality standards in order to provide some protection against effects that research has not yet uncovered.

Examining these directions in light of the statutory language it can only be concluded that Congress did not specifically direct the Administrator to act in any of the ways set forth. First, the statute is silent about considerations of economic or technological feasibility. Second, the statute requires standards to protect public health. It is silent as to the definition of public health and makes no mention of individuals who are particularly sensitive to the effects of pollution. Third, the statute makes no mention of "an absence of adverse effect." Finally, the statute does require an adequate "margin of safety" but makes no reference to requiring that margin "to provide some protection against effects that research has not yet uncovered": The asserted directives are the Administrator's interpretation of the statute and the legislative history. While deference to an agency's construction of the statute is appropriate as discussed by the Court of Appeals (Petitioner's App. pp. 29a-30a) this Court does not always approve that construction, for example, *Industrial Union Dep't.* v. *American Petroleum Inst.*, 100 S. Ct. 2844 (1980).

The Court of Appeals did discuss the basis for the first asserted directive with respect to consideration of economic and technological feasibility, but discussion of the basis from the other asserted directives appears to be limited to the statement that "The Senate Report explains that the Administrator is to set standards which ensure that there is 'an absence of adverse effects.' " A full examination of the legislative history reveals that reliance on the Senate Report is misplaced. The report does state that in setting the

standard consideration should be given to "the need for margins of safety" and that the standard is sufficient to protect such persons whenever there is an absence of adverse effect on the health of a statistically related sample of persons in sensitive groups from exposures to ambient air." 1 LEGISLATIVE HISTORY OF CLEAN AIR ACT AMENDMENTS OF 1970 at 409 & 410 (Senate Report on S. 4358 No. 91-1196) (hereinafter Legis. Hist.) That report related to the bill, S. 4358, as reported by the Senate Committee on Public Works. The language of the bill was significantly different than that contained in the 1970 amendments as adopted. The bill as reported required as follows (Legis. Hist. 542 & 543):

> National ambient air quality standards, proposed and promulgated pursuant to paragraphs (1) and (2) of this subsection, shall be ambient air quality standards the attainment and maintenance of which are necessary to protect the health of persons. Such standards shall be revised, as necessary, in the same manner as promulgated.

Section 109 contained in the 1970 amendments as enacted required standards "requisite to protect the public health" or the health of the community at large. The Senate Report on the other hand refers to legislative standards necessary to "protect the health of persons" or individuals. In setting standards to protect persons or individuals it may be appropriate to ensure an absence of adverse effect, but the protection of the public health is a different concern and it is inappropriate to cite the Senate Report on S. 4358 as definitive on setting standards to protect the public health.

The 1970 amendments also included the statutory requirement for allowance of an "adequate margin of safety". S. 4358 as reported was silent on this issue. The Senate Report did make reference to margin of safety but that discussion should not be considered controlling as it does not

address the final language of the 1970 amendments. The significance is that Congress found it necessary to require in the development of the standards requisite to protect the public health a requirement for a margin of safety. As this Court recently discussed " ' safe' is not the equivalent of 'risk free' " and "a workplace can hardly be considered 'unsafe' unless it threatens workers with a significant risk of harm". *Industrial Union Dept.* v. *American Petroleum Inst., supra* 2864. Applying this concept to Section 109 it can be concluded that if safe does not equal risk free then the imposition of the requirement to allow a margin of safety means the Congress did not intend the National primary ambient air quality standards to ensure "an absence of risk" but intended that those standards protect against a significant risk of harm.

Petitioner LIA asserted a similar interpretation of Section 109 before the Court of Appeals. LIA asserted that standards should be designed to protect against effects which are known to be clearly harmful to health. The Court of Appeals rejected this interpretation as being "at odds with Congress' directives to the Administrator" (Petitioner's App. 43a). A comprehensive review of what Congress' directives were should be made by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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